United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 9956

REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate of Simon T. Douglas, deceased,

Appellee.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Montana, Great Falls Division.

HONORABLE CHARLES N. PRAY, *Judge.*

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EXPLANATORY NOTE

Defendant in the court below appeals from a judgment against it. The parties are referred to herein as "plaintiff" and "defendant" and not as "appellant" and "appellee." Defendant will at times herein also be referred to as R. A. C. C. The decedent's name is sometimes shown as Simon Douglas and sometimes as Simon T. Douglas.

The case was commenced and filed in the United States District Court prior to the effectiveness of the new Rules of Civil Procedure for the District Courts of the United States. The pleadings also were filed prior thereto. The new rules became effective before the trial. The parties stipulated, in a stipulation filed January 11, 1940, (R. 115) that, subject

to the approval of the court, the new Rules of Civil Procedure for the District Courts of the United States should be applicable to all further proceedings in this case. The court approved the stipulation. (R. 118)

STATEMENT SHOWING JURISDICTION OF UNITED STATES DISTRICT COURT AND CIRCUIT COURT OF APPEALS

Jurisdiction is based upon Section 42, Title 28 U. S. C. A., Chapter 229, Section 12, Act of February 13, 1925, 43 Stat. at Large 941, which establishes jurisdiction in actions against a corporation incorporated by or under an act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock.

The action was commenced in the District Court of the Tenth Judicial District of the State of Montana for the County of Fergus against the Regional Agricultural Credit Corporation of Spokane, Washington and seeks damages in the sum of $46,211.48. (R. 3.) The defendant is a corporation incorporated under an act of Congress. (R. 79, 91.) The Government of the United States is the owner of all of the capital stock of the defendant corporation. (R. 154.) Petition for removal to the United States District Court together with the statutory bond were filed with the Clerk of the Montana District Court for the County of Fergus within the time allowed for the defendant to make an appearance. (R. 15, 17, 18, 27.) The transcript on removal was filed with the Clerk of the United States District Court for the District of Montana, Great Falls Division, within thirty days after the filing of the petition and bond for removal. (R. 30.)

The appeal from the judgment of the District Court to the Circuit Court of Appeals for the Ninth Circuit is authorized by Section 225, Title 28 U. S. C. A.

STATEMENT OF THE CASE

Events preceding the commencement of the action.

Defendant was created by the United States Government for the strictly governmental purpose of making loans to livestock men, among others. (Appendix A.) Its stock always

has been wholly owned by the United States. (R. 154.) It is controlled and supervised by the Farm Credit Administration of the United States Government. (Appendix B.) Simon Douglas, plaintiff's intestate, on December 27, 1933, borrowed $17,000.00 from defendant, evidencing such indebtedness by a promissory note (Exhibit 2, R. 162) and giving as security therefor a chattel mortgage, which contained a power of sale on default, on his sheep outfit. (Exhibit 3, R. 163.)

Simon Douglas died on January 12, 1935. (R. 82, 100.) The loan was then in default. (R. 83, 100.) There was little if any equity in the mortgaged property. (R. 178, 180.) It was necessary on account of the condition of the affairs of the intestate that R. A. C. C. advance funds to care for and feed the livestock. (R. 176.) In January, 1935, following the death of Simon Douglas, a representative of Dorothy Worthington, the only heir of Simon Douglas, had a conference with the management of R. A. C. C. in Helena, Montana, for the purpose of reaching a conclusion as to whether such heir would take over the decedent's sheep outfit and assume the debt. (R. 184.) The question was taken under advisement. On January 22, 1935, R. A. C. C., not having been advised by the heir as to her decision, wired to her:

> "Have you made a decision regarding your father's Sheep Stop We must know definitely to enable us to decide what action advisable to protect our security." (R. 178.)

On January 23, 1935, the heir, Dorothy Worthington, wired to R. A. C. C. stating that she had decided not to take over the outfit and assume the indebtedness. (R. 180.)

No funds of the decedent were available to purchase feed and protect the sheep outfit. R. A. C. C. was under the necessity either of foreclosing the mortgage or of advancing further funds which would serve to increase the already existing deficit. (R. 178, 180.)

Thereupon R. A. C. C. commenced taking steps for the sale of the mortgaged sheep outfit under the power of sale contained in the mortgage. (R. 155-161.) Notice was given under the power of sale and pursuant to the statutes of the State of Montana. (R. 155.) The sale was conducted on Feb-

ruary 5, 1935. (R. 157.) No question has ever been raised as to the legality of the procedure for the foreclosure sale other than the contention that it violated Section 10140, Revised Codes Montana 1935, because sale was had before the appointment of a personal representative. In addition to the statutory notice R. A. C. C. caused letters to be sent to various possible prospective purchasers. (R. 190.) The sale was well publicized and well attended, there being approximately 75 persons present. (R. 210.)

The sale of the mortgaged outfit yielded $15,002.10. (R. 159.) After deducting costs of sale there was a balance owing to R. A. C. C. on account of the indebtedness owing by Simon Douglas in the sum of $1,694.64. (R. 161, 307.) Return of Sale was duly made and filed. (Exhibit 1, R. 155-161.)

Commencement of the Action.

On April 4, 1935, plaintiff was appointed administrator of the estate of Simon Douglas. This action was commenced in the Montana State court on the 27th day of May, 1935. (R. 15.) The original complaint set up the note and the mortgage, showing the power of sale, and sought damages to the extent of double the value of the property sold at the mortgage foreclosure sale. (R. 3-13.) The prayer was claimed to be pursuant to the provisions of Section 10140, Revised Codes Montana 1935, which provides that if any person *embezzles* or *alienates* any of the personal property of decedent prior to the appointment of a personal representative that such person is liable for double the value of the property so *embezzled* or *alienated.*

The District Court originally held that the Montana penalty statute was not applicable to this case.

The amended demurrer to the original complaint (R. 31-34) raised two questions: first, that the Montana penalty statute was inapplicable to this case because the mortgage contained a power of sale which was coupled with an interest and which therefore was irrevocable and not affected by the death of the mortgagor; and, second, that the Montana statute was inapplicable to a sale by a mortgagee which

acted in good faith under color of legal right and supposing that he had a right to enforce a lien thereon and who was not an intermeddler acting from wrong motives or in bad faith. These questions were fully argued and briefed to the court. (R. 36-72.) The court sustained the demurrer. (R. 35.)

After the trial the District Court reconsidered the question as to the applicability of the Montana penalty statute, concluded that it was applicable and rendered judgment against the defendant pursuant to such statute.

Following the sustaining of defendant's demurrer to the original complaint, plaintiff was given leave to amend. The amended complaint avoided the point of the demurrer and the court's decision thereon by merely alleging a conversion of the property and claiming double damages under the Montana penalty statute without setting up the mortgage or showing the power of sale. (R. 73.) Defendant filed an answer and cross complaint which set up the mortgage and power of sale. (R. 78.) Plaintiff filed a reply which set up the contention that the original mortgage dated December 27, 1933, under which the mortgage sale had been had, was supplanted and rendered *functus officii* by a new mortgage dated December 19, 1934, and that therefore the sale under the December 27, 1933 mortgage was invalid. (R. 100.) This contention was abandoned by stipulation filed January 11, 1940. (R. 115.)

Plaintiff requested and received permission to present once more to the court at the trial the question of the applicability of the Montana penalty statute. The only issue tried was whether the Montana penalty statute was applicable and if so the reasonable value of the property sold. Following the trial the parties once more submitted to the court briefs on the subject of the applicability of the Montana penalty statute. The court in its informal opinion reached the conclusion that the power of sale in the mortgage was coupled with an interest, to wit: the lien of the mortgage, that it was irrevocable and survived the death of the mortgagor. (R. 298.) The court, however, concluded that Section 10140, the Montana penalty statute, had the effect of temporarily suspending the power of sale during the period intermediate the death of the decedent and the appointment of a personal

representative; and that therefore the statute applied to this case. (R. 299.) The court found that the value of the property sold at the time of sale was $17,000.00 and that the plaintiff was entitled to recover double that value, to wit: $34,000.00; but that defendant was entitled to credits to the extent of the amount received from the sale of the property, $15,002.10 and the deficiency judgment of $1,694.64 and the costs of the sale in the amount of $307.22 and ordered judgment against the defendant in the sum of $16,633.17. (R. 307.)

The court, at the conclusion of the taking of evidence at the trial, did not state what the Findings of Fact, Conclusions of Law and Judgment would be, but kept the case open for the submission of briefs. The court in its informal decision dated February 20, 1941, stated that its decision would be for the plaintiff but still did not make Findings of Fact, Conclusions of Law or render Judgment. Plaintiff did not serve proposed Findings of Fact or Conclusions of Law or Judgment upon defendant prior to the same being signed by the court on March 5, 1941, nor did he serve notice of his intention to submit the same to the court for signature. No opportunity was accorded defendant to object to or make motions to amend the Findings of Fact and Conclusions of Law prior to the same being signed by the court. After the Findings of Fact and Conclusions of Law and Judgment were signed on March 5th (R. 307) they were served on defendant and defendant served and filed on March 12th Objections to and Motions to Amend the Findings of Fact and Conclusions of Law (R. 313) and also a Motion for New Trial (R. 309) and a Motion to Vacate Judgment for Plaintiff and to Enter Judgment for Defendant. (R. 311.) A hearing on such objections and motions was held on March 17, 1941, and thereafter briefs were submitted by both parties in regard to said objections and motions. All these motions were denied on July 16, 1941. (R. 327.)

The first question raised by defendant's brief is that the court erred in holding that the power of sale in the mortgage was suspended by the Montana penalty statute during the period intermediate the death of the mortgagor and the appointment of the personal representative and in applying the Montana penalty statute in the case.

This question is discussed in Section I of the brief. It is raised by Specifications of Error Nos. 1 to 6 inclusive.

If this court agrees with defendant's contention, such decision would entirely dispose of this case and necessitate a reversal of the judgment.

The second question raised by defendant's brief is that the Montana penalty statute cannot be applied in the absence, as in this case, of any evidence tending to prove fraud, bad motive or any intention wrongfully to deprive the estate of its assets.

No evidence was introduced at the trial showing or tending to show any fraudulent conduct on the part of defendant or any bad motive or any intention wrongfully to deprive the decedent's estate of its personal property. The court affirmatively stated in its informal opinion that the sale was honestly conducted. (R. 301.)

Defendant contends that the court erred in applying the Montana penalty statute in a case where the sale of the decedent's property was unaccompanied by fraudulent or wrongful conduct and where at most there was merely a mistake of law. This question is discussed in Section II of the brief. It is raised by Specifications of Error Nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13. A determination of this question in favor of the defendant would entirely dispose of the case.

The third question raised by defendant's brief is that there was no evidence introduced in the case to support the finding of the court that the reasonable value of the property sold was $17,000.00.

Most of the evidence introduced at the trial was directed to the issue of the reasonable value of the property sold at the foreclosure sale. This was because the District Court stated that it would reconsider the question of the applicability of the Montana penalty statute. A holding that the Montana penalty statute was applicable was the only contingency which would make material the evidence respecting the reasonable value of the mortgaged property sold. If this court con-

cludes that the Montana penalty statute is inapplicable or that the defendant cannot be subjected to a statutory penalty, then the finding of the court that the property sold was reasonably worth $17,000.00 instead of $15,002.10 is immaterial because no attack was made by the plaintiff either in the pleadings or at the trial against the honesty and fairness of the conduct of the sale. The finding of value is based upon the assumption that the statute is applicable.

Even if this court decides that the Montana penalty statute is applicable, defendant contends that there was no evidence introduced to sustain the finding that the reasonable value of the property sold was $17,000.00 rather than $15,002.10. This question is discussed in Section III of the brief. It is raised by Specifications of Error Nos. 4, 14, 15 and 16.

The fourth question raised by defendant's brief is that the court should have deducted the amount of the proceeds of the sale which were properly devoted before applying the penalty statute.

The court reached the amount of the judgment by finding the reasonable value of the property sold to be $17,000.00, doubling that amount and then deducting the amount of the debt and costs of sale. (R. 307, 309.) It will be pointed out under Section IV of the brief, that the authorities hold that the personal representative is not damaged as to the proceeds of the sale of a decedent's assets which are devoted to a proper purpose because, if the defendant used the personal property of the decedent for the same purpose that the personal representative would have had to use it, no damage results. Accordingly, if the contention made under Section III of the brief is correct, the property sold for its full value and was properly applied in payment of the debt for which the property was mortgaged. There was no surplus and therefore no damage. If the court was correct in finding that the property sold for less than its reasonable value then the penalty statute could apply only to the difference. The question is raised by Specifications of Error Nos. 4, 14 and 15.

The fifth question raised by defendant's brief is that the Montana penalty statute may not be applied against the United States or an instrumentality thereof.

Defendant makes the contention that the Montana penalty statute may not be applied against the United States nor an instrumentality thereof. This question is discussed in Section V of the brief. It is raised by Specifications of Error Nos. 2, 3, 4, 17 and 18. A determination of this question in favor of the defendant entirely disposes of the case.

SPECIFICATIONS OF ERROR

The judgment entered in this case is erroneous for the following reasons:

1. The court erred in drawing the conclusion of law, in the second unnumbered paragraph of the Court's Conclusions of Law (R. 306), that Section 10140, Revised Codes Montana, suspended the right of exercise of the power of sale contained in the chattel mortgage from the decedent Simon T. Douglas to defendant.

2. The court erred in drawing the Conclusion of Law, in the second unnumbered paragraph of the Court's Conclusions of Law (R. 306), that defendant in making the sale of mortgaged property on February 5, 1935, was proceeding without right and contrary to law and subject to the penalty prescribed in Section 10140, Revised Codes of Montana 1935.

3. The court erred in drawing the Conclusion of Law, in the second unnumbered paragraph of the Court's Conclusions of Law (R. 306), that pursuant to Section 10140, Revised Codes of Montana 1935, plaintiff is entitled to recover from defendant double the value of the property sold.

4. The court erred in drawing the Conclusion of Law, in the third unnumbered paragraph of the Court's Conclusions of Law (R. 307), that the plaintiff is entitled to a judgment of the court for the sum of $16,633.17.

5. The court erred in denying defendant's motion in paragraph number 2 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is not applicable to a sale made under a power of sale in a mortgage such as that involved in this case.

6. The court erred in denying defendant's motion, made in paragraph number 14 of defendant's Objections to and Motions to Amend Findings of Fact (R. 316), that the court amend its Findings of Fact by finding that at the time of the seizure and sale of the mortgaged property the mortgage from Simon T. Douglas dated December 27, 1933, was in full force and effect; that the debt secured thereby was in default; and that said mortgage contained a power to sell the mortgaged property.

7. The court erred in denying defendant's motion, in paragraph number 3 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is inapplicable to a mortgagee acting in good faith under a power of sale.

8. The court erred in denying defendant's motion, made in paragraph number 4 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that the defendant in selling the mortgaged property was acting in good faith.

9. The court erred in denying defendant's motion, made in paragraph number 5 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 317), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, does not apply unless there is the intent wrongfully or fraudulently to deprive the estate, heirs or creditors of assets of the decedent's estate.

10. The court erred in denying defendant's motion, made in paragraph number 5 of Defendant's Objections to and Motions to Amend Findings of Fact (R. 314), to amend its Findings of Fact by finding that defendant in seizing and selling the property mortgaged to it by the decedent Simon T. Douglas did so openly and with notice to all persons concerned and that the acts of the defendant in that regard were without secrecy or concealment.

11. The court erred in denying defendant's motion, made in paragraph number 6 of defendant's Objections to and

Motions to Amend Findings of Fact (R. 315), that the court amend its Findings of Fact by finding that defendant in seizing and selling the mortgaged property was attempting to protect its security and was not attempting to take advantage of the heirs or creditors of the decedent Simon T. Douglas or attempting to divert the assets of his estate from those entitled thereto.

12. The court erred in denying defendant's motion, made in paragraph number 8 of defendant's Objections to and Motions to Amend Findings of Fact (R. 315), that the court amend its Findings of Fact by finding that the defendant in conducting the sale of the mortgaged property used its best efforts to secure the best possible liquidation and that there was no collusion to sell any of the mortgaged property for less than the best possible price available.

13. The court erred in finding as a fact in paragraph number 5 of the Court's Findings of Fact (R. 304), that defendant was given actual notice before and at the time of the sale by responsible persons that the sale was illegal and that its attention was called to the fact that Simon T. Douglas was deceased and that no administrator had been appointed.

14. The court erred in finding as a fact, in paragraph number 7 of the Court's Findings of Fact (R. 305), that the property seized and sold by defendant was of the reasonable value of $17,000.00.

15. The court erred in denying defendant's motion made in paragraph number 13 of defendant's Objections to and Motions to Amend Findings of Fact (R. 316), that the court amend its Findings of Fact by finding that the reasonable market value of the mortgaged property sold by defendant on February 5, 1935, was not in excess of $15,002.10.

16. The court erred in finding as a fact in paragraph number 6 of the Court's Findings of Fact (R. 305), that the weather at the time of the sale was inclement and such as to make the time and date for the sale and disposition of the mortgaged property unfavorable.

17. The court erred in denying defendant's motion, made in paragraph number 15 of defendant's Objections to and

Motions to Amend Findings of Fact (R. 317), that the court amend its Findings of Fact by finding that the defendant is a corporation created by the United States; that all of the stock thereof was and is owned by the United States and that it is an instrumentality of the United States.

18. The court erred in denying defendant's motion, made in paragraph number 9 of defendant's Objections to and Motions to Amend and Make Additional Conclusions of Law (R. 318), that the court amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, provides for a penalty which cannot be imposed on the defendant because it is a corporation created and wholly owned by, and an instrumentality of, the United States.

SUMMARY OF ARGUMENT

I. The chattel mortgage from decedent to Regional Agricultural Credit Corporation, a wholly owned Governmental instrumentality of the United States, expressly granted a power of sale in the event of default, which occurred prior to his death. The law, established by the Supreme Court of Montana, is that a power of sale in a mortgage is coupled with an interest, which is part of the mortgagee's security and survives the death of the mortgagor. The District Court failed to follow this rule and decided that Section 10140, Revised Codes of Montana 1935, suspended the power of sale until the appointment of a personal representative. This was erroneous under the principle of *Erie Railroad Company* v. *Tompkins*. Also the decision of the District Court is contrary to law in that it permits a State statute to suspend a property right granted to an instrumentality of the United States Government.

II. The Montana penalty statute should be construed to be inapplicable unless there is a fraudulent element or unless the alienor is acting from a wrongful motive or with the intention of wrongfully depriving the estate of its assets. Such a construction is supported by a decision by the Supreme Court of Montana which construed another Montana penalty statute. It is also supported by the rule of construction *noscitur a sociis*. It complies with the elementary rule of construction

that penal statutes should be strictly construed. Similar statutes have been thus construed in Oregon, Vermont, Wyoming, Washington and Wisconsin, being all the jurisdictions in which the question has been discussed except Oklahoma. In Oklahoma early decisions to the contrary have been undermined.

III. The finding by the District Court that the reasonable value of the property sold at the foreclosure sale was in excess of the amount realized is not supported by any substantial competent evidence. The weighing of this evidence is necessary only if the court concludes as a matter of law that the Montana penalty statute is applicable.

IV. The defendant had a lien on all of the property sold. The personal representative would therefore have been under the necessity of applying this mortgaged property insofar as necessary to the payment of the mortgage debt. If the reasonable value of the mortgaged property was less than the debt, the sale caused no damage and under the law the Montana penalty statute would be inapplicable. If the property was reasonably worth in excess of the mortgage debt, the Montana penalty statute would be applicable only to such excess.

V. The defendant is part of the United States Government and may not be subjected to the imposition of penalties by the Montana statute.

ARGUMENT

I

SECTION 10140, REVISED CODES MONTANA, 1935, IS INAPPLICABLE TO A SALE MADE PURSUANT TO A POWER OF SALE. SUCH A POWER IS COUPLED WITH AN INTEREST, SURVIVES THE DEATH OF THE MORTGAGOR AND IS NOT SUSPENDED BY THE MONTANA STATUTE. A STATE STATUTE IS INCOMPETENT TO SUSPEND A RIGHT OF THE UNITED STATES OR ITS INSTRUMENTALITIES.

Section I is based upon Specifications of Error Nos. 1, 2, 3, 4, 5 and 6. If, as contended by defendant, the power of sale in the chattel mortgage was effective and was not suspended

between the death of Simon T. Douglas and the appointment of the administrator, then: (Spec. of Err. 1) the court erred in concluding that the power of sale was suspended by Section 10140, Revised Codes Montana 1935; (Spec. of Err. 2) the court erred in concluding that defendant in selling the mortgaged property was proceeding without right, contrary to law and subject to the penalty of said Section 10140; (Spec. of Err. 3) the court erred in concluding that plaintiff was entitled to recover from defendant double the value of the property sold; (Spec. of Err. 4) the court erred in concluding that plaintiff was entitled to judgment for $16,633.17; and (Spec. of Err. 5) the court erred in refusing to conclude that said Section 10140 was inapplicable to a sale under a chattel mortgage with a power of sale. The first five Specifications of Error have to do with conclusions of law. If the proper conclusions of law were adopted, then the court should (Spec. of Err. 6) have found in accordance with the uncontradicted evidence that at the time of the seizure and sale of the mortgaged property the mortgage was in full force and effect (R. 82, 100, 115); that the debt secured thereby was in default (R. 83, 100); and that the mortgage contained a power of sale (R. 167). None of these specifications invokes this court's power to weigh the evidence.

The Statute

Section 10140, Revised Codes Montana 1935, reads as follows:

> If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

The Power of Sale

The chattel mortgage in question (Exhibit 3, R. 163, 167) contains the following power of sale:

> BUT IN CASE DEFAULT BE MADE in payment of the principal or interest as provided in said promissory note (or any thereof) then the said mortgagee, its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and all costs of taking or holding said property or any part thereof, and reasonable attorney's fee, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, successors or assigns.

The debt secured by this mortgage was at the time of the seizure and sale in default. (R. 83, 100.)

The Supreme Court of Montana has squarely held that a power of sale in a trust deed is coupled with an interest, is part of the security of the mortgagee and survives the death of the mortgagor. *Muth* v. *Goddard*, 28 Mont. 237, 72 Pac. 621. The question was whether a power of sale in a real estate trust deed survived the death of the donor. The court answered the question as follows:

> It was said by our own court, in First National Bank v. Bell S. & C. M. Co., supra, "But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land *that it becomes a part of the security and irrevocable.*" (Italics added.)

The authority of the *Muth* case has not been impaired.

The court in *Muth* v. *Goddard* relied upon Section 1792 of Jones on Mortgages. It is to be noted that Jones on Chattel Mortgages and Conditional Sales, Bowers Edition, Section 798, states the same rule with respect to a power of sale in a chattel mortgage:

> The death of the mortgagor does not deprive the mortgagee of his remedy by foreclosure and sale, either in equity under a power of sale, or under a statute. He is not required to file his claim in the administration proceedings, but he may proceed to foreclosure by notice and sale, just as he might have done had the mortgagor survived.

Further citation of authority could be made but seems unnecessary because the court in its informal opinion followed the *Muth* case in reasoning that under the Montana law the power of sale was coupled with an irrevocable interest and survived the death of the mortgagor. The court concluded, however, that Section 10140, Revised Codes Montana 1935, had the effect of suspending the power of sale intermediate the death of the decedent and the appointment of a personal representative.

The statute does not provide that it suspends any power of sale. It merely states that if a person embezzles or alienages personal property of a decedent he shall be subjected to double damages. It speaks wholly in terms of penalty and not at all in terms of suspending a power of sale.

No authority was cited by plaintiff or the court to the effect that Section 10140 suspends the power of sale.

Under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the case of *Muth* v. *Goddard* should have been followed. It is not enough to render lip service to the doctrine by saying that the power of sale survived the death of the mortgagor and then nullify it by holding, without any supporting authority from Montana or elsewhere, that the power was suspended by a statute which does not say that the power is suspended. A power of sale that is suspended is no power of sale. It is useless. *Muth* v. *Goddard* says the power of sale survives death. The District Court said, "Yes, but you can't exercise it." *Muth* v. *Goddard* says the power of sale is part of the security. The District Court said, "but the security is taken away after the death of the mortgagor and before the appointment of a personal representative."

It was contended in the *Muth* case that permitting foreclosure under a power of sale was inconsistent with the Montana probate code. The court held that the power of sale was agreed upon by the parties and suspended the provisions of the probate code. On page 627 the court said:

> It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of administration or by foreclosure in court. This argument cannot be maintained. "The law may suspend its own process. As it gives the process, it may regulate it. But *deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution.*" * * * It follows that the trustee or his successor in trust, having the legal title, could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected. (Italics added.)

The District Court in this case did just the opposite of what the *Muth* case says it should have done. *The court suspended the power of sale. It should have held that the voluntary act of the mortgagor in granting the power of sale suspended the penalty statute.* The decision of the District Court is not only supported by no authority but is entirely inconsistent with the reasoning and decision of the Supreme Court of Montana in the *Muth* case. This was error under the decision in the *Tompkins case.*

The decision of the court also failed to give effect to Section 8257, Revised Codes Montana 1935, which expressly authorizes powers of sale and which provides that the same may be exercised after a breach of the obligation for which the mortgage is a security. Section 8257 reads as follows:

> Power of Sale. A power of sale may be conferred by a mortgage upon the mortgagee or any other per-

son, *to be exercised after a breach of the obligation for which the mortgage is a security.* (Italics added.)

The statute expressly provides that the power may be exercised after a breach of the obligation. It does not state any exception that such power cannot be exercised after grantor's death.

This statute does not expressly apply to chattel mortgages but has been held by the Supreme Court of Montana to be applicable thereto. *Kinsman* v. *Stanhope,* 50 Mont. 41, 144 Pac. 1083.

In the case of an instrumentality of the United States, such as R. A. C. C., the misapplication of the statute is even clearer because it has been held that State statutes are incompetent to deprive United States and its instrumentalities of any part of their security.

United States v. *Summerlin,* 310 U. S. 414, 84 L. Ed. 1283, 60 S. Ct. 1019 (1940). The Federal Housing Administrator became the assignee of a claim against the estate of J. F. Andrew, deceased, but failed to file it within the time prescribed by a Florida statute, which further provided that if it were not so filed, the claim was void. The court held that the State statute was inapplicable to a claim of the United States. On page 1020 the court said:

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.

On page 1021 the court said:

> We hold that the state statute in this instance requiring claims to be filed within eight months *cannot deprive the United States of its right to enforce its claim;* that the United States still has its right of action against the administrator, even though the probate court is to be regarded as having no jurisdiction to receive a claim after the expiration of the specified period. (Italics added.)

The court regarded the claim assigned to the Federal Housing administrator as a claim of the United States. On page 1020 the court said:

> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

So in the case at bar the claim of the R. A. C. C. under its note and mortgage from Simon Douglas was the property of the United States of America. The right of the United States of America under its contract with the decedent, including the power of sale, could not be affected by Section 10140, Revised Codes Montana 1935.

Davis, Director General of Railroads v. *Corona Coal Company*, 265 U. S. 219, 68 L. Ed. 987, 44 S. Ct. 552. The Director General brought an action against the Coal Company for damage done to a railroad wharf while under Federal control. The Coal Company plead the Louisiana one year statute of limitations. The court held that it was inapplicable. On page 221 the court said:

> In E. I. Dupont DeNemours & Co. v. Davis, 264 U. S. 456, 44 Sup. Ct. 364, 68 L. Ed. . ., April 7, 1924, it was held that the Director General was not barred by the statutes of the United States in an action on behalf of the United States in its governmental capacity to recover upon a liability arising out of his control. *The familiar rule was repeated that the United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided.* The reasoning of that case excludes the notion that there was any intentional waiver by the United States of its sovereign right to collect its claims, irrespective of any statute, "as soon as practicable." (Italics added.)

In the case at bar R. A. C. C. chose to take steps to foreclose its mortgage in its own name. It would have been perfectly proper for the United States to have brought an action for the foreclosure of the mortgage, as was done in *United States* v. *Summerlin*, supra.

Reconstruction Finance Corporation v. *Krauss*, 12 Fed. Supp. 44 (D. C. N. J.)

North Dakota-Montana Wheat Growers' Ass'n v. *U. S.*, 66 Fed. (2d) 573 (8th C. C. A.)

II

THE MONTANA PENALTY STATUTE, SECTION 10140 REVISED CODES MONTANA 1935, IS A HIGHLY PENAL STATUTE, AND SHOULD NOT HAVE BEEN APPLIED TO THE CASE AT BAR BECAUSE THERE WAS NO EVIDENCE THAT THE SALE OF THE MORTGAGED ASSETS WAS FRAUDULENT OR PURSUANT TO ANY WRONGFUL MOTIVE OR FOR THE PURPOSE OF WRONGFULLY DEPRIVING DECEDENT'S ESTATE OF ITS ASSETS.

Section II is based upon Specifications of Error Nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13. If, as contended by defendant, Section 10140, Montana Revised Codes 1935, is inapplicable where there is no fraudulent conduct, no wrongful motive and no purpose wrongfully to deprive the estate of its assets, then: (Spec. of Err. 2) the court erred in concluding that defendant in selling the mortgaged property was proceeding without right, contrary to law and subject to the penalty of Section 10140; (Spec. of Err. 3) the court erred in concluding that plaintiff was entitled to recover from defendant double the value of the property sold; (Spec. of Err. 4) the court erred in concluding that plaintiff was entitled to judgment for $16,633.17; (Spec. of Err. 7) the court erred in refusing to conclude that said Section 10140 is inapplicable to a mortgagee acting in good faith under a power of sale; (Spec. of Err. 8) the court erred in refusing to conclude that defendant in selling the mortgaged property was acting in good faith; (Spec. of Err. 9) the court erred in refusing to conclude that said Section 10140 does not apply unless there is the intent wrongfully or fraudulently to deprive the estate, heirs, or creditors of assets of the decedent's estate. The above Specifications of Error have to do with conclusions of law. If the proper conclusions of law were adopted then the court should have found in accordance with the uncontradicted evidence (Spec. of Err. 6) that at the time of the seizure and sale of the mortgaged property the mortgage was in full force and effect (R. 82, 100, 115), the debt secured thereby was in default (R. 83, 100), and the mortgage contained a power of sale (R. 167); (Spec. of Err. 10), that defendant in seizing and selling the mortgaged property did so openly and

with notice to all persons concerned and that the acts of defendant were without secrecy or concealment; (Spec. of Err. 11) that defendant in seizing and selling the mortgaged property was attempting to protect its security and was not attempting to take advantage of the heirs or creditors of the decedent, Simon T. Douglas, or attempting to divert the assets of his estate from those entitled thereto; (Spec. of Err. 12) and that the defendant in conducting the sale of the mortgaged property used its best efforts to secure the best possible liquidation and that there was no collusion to sell any of the mortgaged property for less than the best possible price available. Specifications of Error 6, 10, 11 and 12, although dealing with questions of fact, do not invoke the court's power to weigh the evidence because they are supported by the uncontradicted evidence in the case. In addition to the foregoing this section of the brief deals with Specification of Error 13 in making the contention that the statements and claims made at the time of the sale were wholly immaterial because they were not shown to have been made by any persons connected with the estate or heirs or creditors.

Section 10140, Revised Codes Montana 1935, is a highly penal statute, not in any sense remedial.

Springer v. *Jenkins,* 47 Ore. 502, 84 Pac. 479,
Roys v. *Roys,* 13 Vt. 543, (1841)
Delfelder v. *Poston,* 42 Wyo. 176, 293 Pac. 354.

It is the law as announced in Oregon, Vermont, Washington and Wyoming that penalty statutes such as the Montana statute are inapplicable in the absence of fraud, wrongful motive or wrongful abstraction of assets from a decedent's estate. In Wisconsin the same result has been reached.

Springer v. *Jenkins,* 47 Ore. 502, 84 Pac. 479 (1906).

Here, defendant sold decedent's sheep after decedent's death and before appointment of a personal representative, yet the Oregon penalty statute was not applied. The court concluded that the foreclosure action and sale were premature because the debt was not due but that the defendant, though ill advised, did not act wrongfully or in bad faith or

from wrong motives and concluded that the penal statute was inapplicable. On page 481 the court said:

> But, however, this may be, we are of the opinion that section 1152 does not apply to a case where the defendant acted in good faith under color of legal right, supposing he had title to the property or a right to enforce a lien thereon, though he should subsequently be unable to establish such title or right. *The statute is highly penal in its consequences, and was evidently intended to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property of a deceased person, by mulcting them in double damages;* and its language should, we think, be so construed. To subject a defendant to the penalty given by the statute, it should appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law. (Italics added.)

In the following two Vermont cases defendants alienated personal property of decedents after death and before appointment of personal representatives, yet the Vermont penalty statute was not applied.

Batchelder v. *Tenney,* 27 Vt. 578 (1855).

Defendant, claiming to be a joint owner in certain personal property of a decedent, caused the same to be sold. The court, quoting the Vermont statute, substantially identical with the Montana statute, held that it was inapplicable because the sale was not with the intent of wrongfully abstracting the property from the estate. The court said:

> We think, to bring a case within this section of the statute, the act complained of must, at least *be done with the intent of wrongfully abstracting the property from the estate of the deceased, to the injury of its assets.*

Roys v. *Roys,* 13 Vt. 543 (1841).

The defendant used and disposed of certain pork, bacon, rum and codfish which had belonged to a decedent. Plaintiff

sued under the penal statute, which is substantially identical with the Montana statute. The court, on page 548, said:

> * * * The statute, subjecting the party to pay double the value of the property, is highly penal in its consequences, and *should not be applied to a case where he acted in good faith, under color of legal right, supposing he had good title, though it might turn out otherwise.* To subject the defendant to the penalty, he must have acted from a wrong motive, and mala fide. (Italics added.)

This case contains an interesting discussion of the historical significance of this statute, which in the beginning was a legislative limitation of the severe consequences imposed upon an executor *de son tort.*

Delfelder v. *Poston,* 42 Wyo. 176, 293 Pac. 354 (1930).

This case contains the most exhaustive discussion of the question that has come to our attention. It holds that the Wyoming statute, substantially identical with the Montana statute, is inapplicable in a case where the alienor was acting innocently and not fraudulently.

After a full review of all the authorities, including those from Oklahoma, California, Wyoming, Oregon and Vermont, the court reached the folowing conclusion:

> We think it may fairly be deduced from the preponderance of authority that, in order to be subjected to the liability imposed by section 6830, supra, *the person who "alienates" property of an estate must wrongfully transfer the same, acting in that respect from a wrong motive and mala fide.* (Italics added.)

Jackson v. *Lamar,* 67 Wash. 385, 121 Pac. 857 (1912). The defendant Lamar claiming the decedent had made a gift *inter vivos*, exercised dominion over assets of decedent prior to the appointment of a personal representative. The court held he had not made such a gift. The personal representative asked for double damages under the Washington penalty statute. On page 861 the court said:

> Respondent's second contention is based upon Section 1460, Rem. & Bal. Code; "If any person before the granting of letters testamentary or administration shall embezzle or alienate any of the moneys, goods, chattels or effects of any deceased person, he shall stand chargeable, and be liable to the action of the executor or administrator of the estate, in double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate." David Lamar came into possession of this property under a claim of ownership. *His possession was therefore an innocent one, and he could not be held as for an embezzlement.* Beckman v. McKay, 14 Cal. 250. (Italics added.)
>
> *Merrill* v. *Comstock,* 154 Wis. 434, 143 N. W. 313, (1913).

Section 3824 Laws of Wisconsin 1898 provided that if any person, before the granting of letters testamentary or of administration, shall embezzle or convert to his own use any personal property of any deceased person, such person shall be liable for double the value of the property so embezzled or converted. The defendant, following the death of her husband, secured a deposit belonging to him from a bank and also an amount owing to him from a corporation. The plaintiff was appointed administrator and sued to recover double the sums converted. Defendant set up that the assets of the decedent so secured by her were paid out for necessary funeral expenses and expenses of last sickness. A demurrer to the answer was sustained and the defendant appealed. The court held that the answer stated a good defense.

Although the Montana Supreme Court has not passed upon this question with respect to Section 10140, it has decided with respect to another Montana penalty statute for conversion that penalty statutes are not applied generally, even though general language is used, but only if there are present certain elements justifying the imposition of the penalty.

> *McDonald* v. *Montana Wood Co.,* 14 Mont. 88, 35 Pac. 668 (1894).

A Montana statute, now Section 9476 Revised Codes Montana 1935, provided treble damages for the conversion of logs

or timber. Plaintiff contended that he need not allege or prove malice, wantonness or evil design because the language of the statute applied generally to any conversion. The court held that the statute does not apply to an ordinary conversion but only when the defendant has been guilty of willfulness, malice, wantonness or evil design. Said the court:

> According to the view of the circuit judge, the statute applies to every case of the conversion of logs, timber, or lumber floating in any of the waters of this state, or lying on the banks or shores of such waters, or on any island where the same may have drifted, and gives treble damages as the measure of recovery. It seems to us that this is an unreasonable and unsound construction of the provision, *True, the language used is general and, if literally interpreted, would include any conversion.* But, says an acknowledged authority on this subject, in interpreting a statute it is not always a safe rule, or a true line of construction, to decide according to the strict letter of the act, but courts will rather consider what is its fair meaning, and will expound it differently from the letter, in order to preserve the intent. Qui haeret in litera haeret in cortice. Broom, leg. Max. p. 536. *Observing this rule of interpretation, looking at the object and purpose of the statute, we cannot think it was intended to apply to every conversion of this kind of property, situated or found as described, without regard to the question whether the conversion was wanton and willful or not. It is needless to observe that the law is highly penal in its character.* By way of punishment it subjects the wrongdoer in certain cases to an extraordinary liability for the property of another appropriated to his use. In some cases the conversion may be merely a technical one in law, arising from accident, mistake, or even carelessness, without any evil design, and where the damages recoverable at common law afford an adequate compensation to the party injured." (Italics added.)

The decision of the Supreme Court of Montana in the *McDonald* case is supported generally by the authorities.

Gardner v. *Lovegren*, 27 Wash. 356, 67 Pac. 615,
Menasha Woodenware Co. v. *Spokane International Ry. Co.*, 19 Ida. 586, 115 Pac. 22,
Stewart v. *Sefton*, 108 Cal. 197, 41 Pac. 293,
Isom v. *Rex Crude Oil Co.*, 140 Cal. 678, 74 Pac. 294.

Statutes imposing multiple damages are penal in character and should be strictly contrued against the imposition of the penalty. Statutes imposing multiple damages are penal in character, 17 Corpus Juris, 997. It is elementary that statutes are strictly construed against the imposition of the penalty.

Cooley's Blackstone, Fourth Edition, Vol. 1, page 80, paragraph 8, reads as follows:

> *Penal statutes* must be construed strictly.

24 *Corpus Juris* 1217:

> The rule of strict construction is applied to statutes providing a penalty for intermeddling with the estate of a decedent.

65 *Corpus Juris* 157:

> Statutes imposing double damages are penal in nature and will be strictly construed so as to avoid the imposition of such damages where the case is not within the evident purpose of the statute.

The construction of the penalty statute adopted by Wyoming, Oregon, Vermont, Washington and Wisconsin is supported by the rule of construction *noscitur a sociis.*

The statute aims at a weakness in human nature which has often resulted in the personal property of decedents being wrongfully appropriated. The diversions have sometimes been caused by persons wrongfully taking property and themselves using it and at other times by wrongfully disposing of the property. In the statute embezzlement covers the first classification and alienation the other. Embezzlement is used to include one kind of wrongful disposition. Alienation is used to cover another kind of wrongful disposition. It seems unthinkable that the legislature intended that for one kind of disposition, in order for the statute to apply, fraudulent or criminal

intent is essential, but that for the other kind of disposition fraudulent or criminal intent is unnecessary and that the statute applies regardless of good faith and innocence. If the legislature intended that the statute would apply only if there is a criminal or fraudulent element as to one kind of disposition, then it would presumably intend that there should be a like element as to the other.

The word "embezzle" necessarily involves the element of fraudulent intent. *Jackson* v. *Lamar,* 67 Wash. 385, 121 Pac. 857 (1912). It is submitted that a correct construction of the statute requires fraudulent intention for the other kind of disposition, alienation. The case at bar seems perfect for application of the rule of construction *noscitur a sociis,* well established by the Supreme Court of Montana and other courts.

State v. *Moran,* 24 Mont. 433, 63 Pac. 390 (1900).

The question was whether the Montana Supreme Court had jurisdiction to grant an injunction against the use of a certain political party name in a purely political controversy. The decision turned upon the meaning of the word "injunction" used in the constitutional grant of jurisdiction in association with the words "writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and injunction." On page 392 the court said:

> * * * *Noscitur a sociis* is an old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this consideration. Lord Bacon gives the same rule in a more detailed form, more emphatic here. "Copulatio verborum indicate acceptionem in eodem sensu." Here are several writs of defined and certain application classed with one of vague import. We are to be guided in the application of the uncertain by its certain associates.

Accord, *Northern Pacific Railway Co.* v. *Sanders County,* 66 Mont. 608, 214 Pac. 596; *Young* v. *Board of Trustees, etc.,* 90 Mont. 576, 4 Pac. (2d) 725 (1931).

An instructive case is *Nettles* v. *Lichtman,* 228 Ala. 52, 152 So. 450, 91 A. L. R. 1455. A deed granted the right to trees and timber. The question was whether this included trees too small for timber but useful for wood pulp. The word "trees" standing alone undoubtedly would have included the wood pulp trees. Its association with the word "timber" induced the court to hold that the words did not include the wood pulp trees. On page 1461 A. L. R. the court said:

> There is a well-known and ancient maxim, *noscitur ex sociis*—the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it—broader in its scope than the kindred maxim, *ejusdem generis,* which has been given frequent application by this court.

So in the case at bar the association of the word "alienate" with the word "embezzle" affects the meaning of "alienate" and limits its application to cases where there is fraudulent or criminal conduct and excludes its application to cases where defendants acted in entire good faith.

The Supreme Courts of California and Oklahoma have also dealt with statutes similar to the Montana penalty statute.

Jahns v. *Nolting,* 29 Cal. 507,

Litz v. *Exchange Bank of Alva,* 15 Okl. 564, 83 Pac. 790 (1905),

Aultman and Taylor Machinery Co. v. *Fuss,* 86 Okl. 168, 207 Pac. 308 (1922),

Sauls v. *Whitman,* 171 Okl. 113, 42 Pac. (2d) 275 (1935),

Shawnee National Bank v. *Van Zant,* 84 Okl. 107, 202 Pac. 285 (1921),

Nichols & Shephard Co. v. *Dunnington,* 121 Okl. 213, 247 Pac. 353 (1926),

In re Wagner's Estate, 178 Okl. 384, 62 Pac. (2d) 1186.

The California case does not hold contrary to defendant's contention. The original Oklahoma case applied the statute more broadly than other jurisdictions but has been substantially undermined by the later cases.

The conduct of defendant at bar was entirely inconsistent with the imposition of the statutory penalty.

The conduct of defendant following the death of the decedent was consistently frank, open and above board. The sole heir of the decedent was accorded the opportunity of taking over the mortgaged outfit and making satisfactory financial arrangements with defendant. (R. 185.) A conference was arranged and conducted between defendant and the representative of said heir. (R. 185.) The heir did not announce her decision. Defendant was considerate enough to wire to her to find out what decision she had made. (R. 178.) She wired back that she was unwilling to take over the property and assume the obligation. (R. 180.) There was nothing surreptitious or clandestine in defendant's conduct. There is no evidence and no contention by plaintiff that defendant hid any property, concealed any property or removed any property. There is not the slightest suggestion that defendant acted maliciously, wantonly or from evil design. The only suggestion made by the court in its informal opinion and Findings of Fact and Conclusions of Law is that defendant was notified at the time and place of sale by a lawyer and a banker that the sale was claimed to be illegal because an administrator had not been appointed. These persons were not shown to have any relation to the estate, the heirs or the creditors. For aught that appears they were mere intermeddlers. If they had been more, it may be assumed that they would not have waited until the sale was beginning but would have at least given notice of objection in advance of the fact that interested parties objected to the sale, or, more likely, have sought to enjoin the sale. It would not have been a trivial thing to postpone the sale at the time when the suggestion of illegality was made. Notice, both formal and advertising, had been given. Approximately seventy-five persons were present, including many substantial prospective bidders. It would have been seriously detrimental to the liquidation to have postponed. This conduct is not bad faith that is essential in order for the penalty statute to be applied.

The argument that the sale, in spite of the assertions made by the banker and lawyer, constituted bad faith begs the question of whether defendant was rightfully exercising

the power of sale contained in the mortgage. The District Court, when it sustained the amended demurrer to the original complaint held that the defendant acted rightfully and within its power of sale. After the trial the court changed its opinion in this respect. If the District Court had adhered to its original opinion the sale would have continued under the law of the case to be lawful. Does a change in the court's opinion on a question of law make an act fraudulent or in bad faith within the meaning of the authorities? Even if defendant were incorrect in its understanding of the law, it was merely a mistake of law. As has been shown, it does not constitute bad faith within the meaning of the statute.

III

THERE IS NO SUBSTANTIAL EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT THE REASONABLE VALUE OF THE PROPERTY SOLD WAS $17,000.00. THE EVIDENCE CONCLUSIVELY AND WITHOUT CONTRADICTION SHOWS THAT THE PROPERTY SOLD FOR ITS FULL VALUE, $15,002.10.

Section III is based on Specifications of Error Nos. 4, 14, 15 and 16. Specifications of Error 14 and 15 invoke the court's power to examine the evidence by contending that (Spec. of Err. 14) the court erred in finding that the property seized and sold by defendant was of the reasonable value of $17,000.00 and (Spec. of Err. 15) that the court erred in failing to find that the reasonable market value of the mortgaged property was not in excess of $15,002.10. It would follow (Spec. of Err. 4) that the court erred in concluding that the plaintiff was entitled to judgment for $16,633.17. Herein also is discussed Specification of Error 16 that the court erred in finding that the weather at the time of sale was inclement and such as to make the time and date for the sale and disposition of the mortgaged property unfavorable because such finding is immaterial.

If the court concludes that Section 10140 of the Montana 1935 Code is inapplicable to the case at bar, then all of the evidence introduced at the trial of the case on the issue of

the reasonable value of the property sold becomes immaterial. No attack was made upon the legality of the mortgage foreclosure sale either in the pleadings or at the trial other than the question as to the Montana penalty statute. Merely because the trier of the facts reaches the conclusion that the reasonable value of the property sold is $17,000.00, whereas the foreclosure sale yielded $15,002.10, is not a legal reason for upsetting the sale and substituting the opinion of the trier of the facts. A chattel mortgage cannot be set aside merely because the price received is regarded as inadequate. *Exchange State Bank* v. *Occident Elevator Co.*, 95 Mont. 78, 24 Pac. (2d) 126, 90 A. L. R. 740.

However, if the Circuit Court of Appeals should find that Section 10140 is applicable to the case at bar, then it is defendant's contention that the evidence shows without conflict that the property was sold for its full reasonable market value.

The finding of the court that the reasonable value of the property sold was $17,000.00 rather than $15,002.10 is not based upon any substantial evidence and should be set aside. The only reason stated by the court either in the informal opinion or in the findings or conclusions was that the sale was held under unfavorable conditions. (R. 301, 305.) There is no evidence whatsoever that the weather in any way affected the prices received. It is true that there is evidence that the weather was cold and a wind was blowing. That, however, is commonplace in the State of Montana in February. It is submitted that the defendant was not under the necessity of paying for feed and for herders to take care of these sheep until a warm day. Moreover, when notice of sale is given one cannot know in advance what the weather conditions will be. The evidence shows conclusively and without contradiction that the sale was very well attended. Approximately 75 persons attended. (R. 210.) Many substantial prospective bidders, able and willing to bid, attended the sale. (R. 210.) The bidding was spirited and in many cases the various lots brought more than competent witnesses considered them to be worth. For these reasons, as asserted in Specification of Error No. 16, the court erred in finding that the weather was

inclement and that the sale was held under unfavorable conditions.

The evidence shows conclusively and without contradiction that the sale brought the full market value of the mortgaged property.

The allegation of the amended complaint is that the property was of "the value of $31,500.20." Market value is not alleged. The action is for conversion. The measure of damages is the market value of the property at the time and place of the conversion. The issue for consideration is the *market value* of the property. *James* v. *Speer,* 69 Mont. 100, 220 Pac. 535. Market value has been defined by the Supreme Court of Montana in the case of *State* v. *Lee,* 103 Mont. 482, 63 Pac. (2d) 135 to mean:

> * * * The actual value mentioned in the statute is the "market value"; that is, the price that in all probability would result from fair negotiations where the seller is willing to sell and the buyer desires to buy. Accord: *Rider* v. *Cooney,* 94 Mont. 295, 23 Pac. (2d) 261
> *State* v. *Hoblitt,* 87 Mont. 403, 288 Pac. 181
> *Mont. Ry. Co.* v. *Warren,* 6 Montt. 275, 12 Pac. 641

Defendant produced the very best possible evidence of market values. It introduced not only the opinion of disinterested witnesses, qualified to express opinions, who attended the sale and saw the mortgaged property but also evidence of a public sale of which adequate public notice was given, intelligently and fairly conducted, and which was attended by many substantial persons desirous of buying and able to pay.

The sales of property were as follows:

Band of 1453 ewe lambs sold at $4.10 per head for	$ 5,957.30
Old band of ewes, 1080 head sold for $2.25 per head for	2,430.00
Young band of ewes, 1238 head, sold for $3.40 per head, for	4,205.80
21 head of horses, sold for	860.00
308 sacks of molasses cake sold for $1.30 per sack for	400.40

236 cut-back lambs and ewes with some old bucks for	110.00
Miscellaneous machinery, tools, wagons, saddle bags, saddles, tents, pelts, etc., for	435.00
46 tons of old hay sold at $2.10 per ton for	96.80
800 pounds of oats sold at $1.50 per hundred for	12.00
Miscellaneous oats, hay and blue joint sold for $4.25 per ton, for	495.00
Total	$15,002.30

The foregoing items total $15,002.30. However, the return of sale and the findings of fact all show the total to be $15,002.10.

The Lambs sold for their full market value at $4.10 per head. John G. Cameron was of the opinion that this was more than their market value; that the market value was between $3.50 and $4.00 per head. (R. 280.) W. E. Robinson was of the opinion that the lambs sold for all they were worth and that $4.10 was a big price. (R. 255.) William Ragan was of the opinion that the market value of the lambs was $3.50 per head and he discontinued bidding at that point. (R. 268.) J. A. Robinson was of the opinion that the market value of the lambs was $3.00 to $3.25 per head. (R. 217.) The deceased, Simon Douglas, in the application for the loan, showed the lambs to be worth $3.00 per head. (R. 244.) R. I. Balch and M. W. Wildschults and other substantial buyers adequately financed to purchase were present but permitted Daley Johnson to buy the lambs at $4.10 per head. (R. 277, 284.)

Old band of 1080 head of ewes sold for their full market value at $2.25 per head. This band had so many aged ewes that Cameron and Balch were not interested. (R. 280, 284.) W. E. Robinson thought that $2.25 a head was a very fair value. (R. 255.) William Ragan was of the opinion that the market value for these ewes was $2.00 per head and he stopped bidding at that point. (R. 268.) J. A. Robinson was of the opinion that they sold for their market value. (R. 213.) M. W. Wildschults, adequately financed, stopped bidding five or ten cents below the sale price. (R. 277.)

Young band of 1238 ewes sold for their full market value at $3.40 per head. John G. Cameron was of the opinion that the market value of these sheep was from $3.00 to $3.50 per head. (R. 280.) R. I. Balch stopped bidding at $3.30 or $3.35 per head because he thought that was all they were worth. (R. 284.) W. E. Robinson thought $3.40 was a fair price. (R. 256.) William Ragan with Henry Lingshire was the successful bidder.

21 head of horses sold to M. W. Wildschults for $860.00. He resold them in parcels over a period of a month or two and lost $50.00 on the transaction. (R. 278.) Plaintiff made no contention that this was less than their full market value.

Molasses Cake, 308 one hundred pound sacks sold at $1.30 per sack. Plaintiff contends that the market value was $40.00 a ton, which would be $2.00 a sack or a difference of $215.60, a negligible item. There is an adequate explanation for the failure of the sale of the molasses cake to bring a higher price. As W. E. Robinson testified, either you want it at the time or you don't. (R. 257.) It is an emergency feed, usually purchased early in the winter season so that it will be on hand in an emergency. The season of its necessity was almost over. A purchaser would have to move it and keep it until the following winter. (R. 214.)

236 cut back lambs and ewes with some old bucks. These sold to Tom Wight for $110.00. They were what was called the "hospital" end of the outfit, meaning that they were weak or ailing and had to have special attention. Cut back lambs are small lambs that have not done well and need extra care and are placed in what is called a "hospital." (R. 215.) This item was so unattractive that the autioneer had more difficulty in selling it than anything else. He had to plead with Tom Wight to get him to take them. (R. 215.) Tom Wight was able to do something with them because he was on the ground in charge of the outfit. (R. 215.) Plaintiff made no contention that the full market value was not secured.

Machinery, tools and equipment. The machinery, tools and equipment sold for $410.00. It consisted of old used tools, hay machinery, an old tractor, an old car, some wagons and

a sheep camp, all badly run down. (R. 215.) No further discussion will be made because plaintiff made no contention that this was less than the fair market value.

46 tons of old hay was sold at $2.10 a ton. This was two and three year old hay, almost entirely cheat grass, which is the poorest kind of feed. The age of the hay makes it deteriorate. (R. 216.) Here again no question was made by plaintiff that this hay sold for less than its value.

90 tons of oat hay and blue joint hay sold at $4.25 per ton. J. A. Robinson bought this in for the Regional Agricultural Credit Corporation and later succeeded in selling it for $5.50 per ton and gave credit for the extra $1.25 per ton to the Simon Douglas estate. (R. 216.) The hay was pretty good feed up until the first of the year when the mice got to working so hard on it. (R. 217.) Here again the plaintiff made no complaint about the price received for this hay.

800 pounds of oats sold for $12.00 or at the rate of $1.50 per hundred. No complaint was made by plaintiff regarding the price received for these oats.

Plaintiff produced no competent evidence on market value.

The witnesses produced by defendant on the issue of market value all attended the sale and participated in the sale. They were not dealing with theoretical values but with actual commodities and dollars. Contrast that with the witnesses produced by the plaintiff—**Hal Clement, George Yeager, Frank Birkinbine** and **Joe C. King.** Not one of them attended the sale. Not one of them participated in the sale. Not one of them backed his judgment with cash. Hal Clement admitted that he didn't have any opinion about market value. (R. 123.) George Yeager was unable to describe to the court the property concerning which he attempted to express an opinion. (R. 131-133.) Frank Birkinbine had no knowledge whatever of the outfit except that he purchased from Daley Johnson and O. A. Nepstad the aged ewes in the band of 1080. (R. 139, 140.) Joe C. King's only knowledge of the outfit was that he drove out to the place and spent about half an hour in looking over the outfit without even getting out of his car and without mouthing any of the ewes. (R. 144-148.)

IV

IT IS UNDISPUTED THAT DEFENDANT HAD A FIRST LIEN ON THE PROPERTY SOLD AND WAS ENTITLED TO THE PROCEEDS THEREOF UP TO THE EXTENT OF THE DEBT OWING. IF THE PROPERTY SOLD FOR ITS FULL VALUE PLAINTIFF WAS NOT DAMAGED BECAUSE NOT ENOUGH WAS REALIZED TO PAY DEFENDANT'S DEBT. IF IT SOLD FOR LESS THAN ITS FULL VALUE THE DAMAGE IS ONLY THE DIFFERENCE BETWEEN THE SALE PRICE AND THE FULL VALUE AND THE PENALTY SHOULD BE APPLIED IF AT ALL ONLY TO SUCH DIFFERENCE.

Section IV is based on Specifications of Error Nos. 4, 14 and 15. If, as contended by defendant in Specifications of Error Nos. 14 and 15, the property sold for its full value, plaintiff was not damaged and the court erred in concluding (Spec. of Err. 4) that the plaintiff was entitled to a judgment for $16,633.17. If the property sold for less than its full value the judgment should be only for double the difference between the sale price and the full value.

Merrill v. *Comstock,* 154 Wis. 434, 143 N. W. 313 (1913).

Section 3824 Laws of Wisconsin 1898 provided that if any person, before the granting of letters testamentary or of administration, shall embezzle or convert to his own use any personal property of any deceased person, such person shall be liable for double the value of the property so embezzled or converted. The defendant, following the death of her husband, secured a deposit belonging to him from a bank and also an amount owing to him from a corporation. The plaintiff was appointed administrator and sued to recover double the sums converted. Defendant set up that the assets of the decedent so secured by her were paid out for necessary funeral expenses and expenses of last sickness. A demurrer to the answer was sustained and the defendant appealed. The court held that the answer stated a good defense. On page 315 the court said:

> * * * It was also well settled that in such an action the executor de son tort was entitled to be cred-

ited with lawful claims against the estate which he had discharged, and that the plaintiff must, in order to recover, show a loss or damage to the interest which he represented occasioned by the unlawful act. For illustration: If the intermeddler had paid out all of the estate which came into his hands in discharge of a valid preferred claim against the estate, the general creditor suing or the administrator plaintiff who represented only such general creditors of the second class and legatees or heirs could not recover.

* * * Disregarding rules based upon the form of action, it is safe to say that this common-law rule rested primarily upon the consideration that the plaintiff was not damaged by such act of the third person.

(Page 316)

* * * If the answer shows that no damage has been done to the estate or to the administrator in this capacity, there is no legal wrong under section 3259, supra. The law does not insist upon the idle ceremony of collecting this money from the widow for the purpose of repaying it to the same persons to whom she has already paid it. Nor has she made it available to the general creditors by such payment. Nor does equity take money away from any person at the suit of a trustee for an inferior class of creditors where such person would be by that same payment entitled by subrogation to the status of a preferred creditor. Having applied the assets of the estate in payment of these preferred claims, neither creditors of the second class nor heirs were aggrieved by such payment.

(Page 317)

* * * The title of executor de son tort may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate.

In *Delfelder* v. *Poston*, 42 Wyo. 176, 293 Pac. 354 (1930), discussed supra, it appeared that the proceeds of the aliena-

tion were applied in reduction of the mortgage debt and to an extent greater than the true value of the property alienated. The court, after an extensive review of the cases on this subject, on page 363 said:

> * * * Unquestionably the mortgaged property necessarily had to be applied first to the payment of that indebtedness. No estate creditors could have the slightest claim upon it, unless the price paid therefor and credited upon the debt was less than its real value. The trial court's finding forecloses here any such question as that. It follows, therefore, as the matter stands in this court, that no injury whatsoever has been inflicted upon either the plaintiff or the estate, but the transaction was in the interest of both.

Rutherford v. *Thompson,* 14 Ore. 236, 12 Pac. 382.

The plaintiff as administratrix sued the defendant for conversion and wrong doing in connection with certain buggies manufactured and owned by plaintiff's decedent. Defendant showed that the proceeds of the buggies were applied in payment of debts of the deceased. The court held that this was a proper defense. On page 384 the court said:

> * * * But if this be considered doubtful, the acts complained of must be treated with reference to their beneficial or injurious character. To deprive the defendant, under the facts, of the right to give such payment in evidence, in mitigation of damages, would certainly be rank injustice. If they are debts which the rightful representative would be bound to pay in due course of administration, they create an equity against the estate; they are not injurious, but must be considered as beneficial, making it competent for the defendant to give such payments in evidence which operated by way of recoupment. * * *
>
> These principles of law we believe still to be applicable in determining the liability of the defendant to the plaintiff as administratrix; that in such action it is not material whether the defendant be treated as an executor *de son tort* or a wrong doer,—the liability

in either case, to account to the executor or administrator, is the consequence of the same act, and is the same, and must be governed by the same principles of legal justice; and, finally, that the justice of the law remains unaffected, to be applied and administered accordingly as the defendant has injuriously or beneficially acted with reference to the estate.

The court found that the reasonable value of the property sold was $17,000.00. The property actually sold for $15,002.10. Under the doctrine of the foregoing cases and assuming that the finding of the trial court is upheld, the measure of damages would be the difference between $17,000.00 and $15,002.10, $1997.90 minus the deficiency owing to defendant, $1694.64, which would leave $303.26, doubled by the statute, would amount to $606.52. If, however, this court sustains defendant's contention that the finding of the trial court that the property was of a reasonable value of $17,000.00 cannot be upheld and that the property was of a reasonable value of only $15,002.10, which is less than the amount of the debt owing, then under the doctrine of the foregoing cases the plaintiff was not damaged at all and there can be no recovery.

V

DEFENDANT IS A WHOLLY OWNED GOVERNMENTAL INSTRUMENTALITY OF THE UNITED STATES AND IS NOT SUBJECT TO THE PENALTY PROVISIONS OF THE MONTANA STATUTE.

Section V is based on Specifications of Error Nos. 2, 3, 4, 17 and 18. If, as contended by defendant, the Montana penalty statute cannot be applied against an instrumentality of the United States Government, then: (Spec. of Err. 2) the court erred in concluding that defendant in selling the mortgaged property was proceeding without right, contrary to law and subject to the penalty of Section 10140, Revised Codes Montana 1935; (Spec. of Err. 3) the court erred in concluding that plaintiff was entitled to recover from defendant double the value of the property sold; and (Spec. of Err. 4) the court erred in concluding that plaintiff was entitled to a judgment for $16,633.17. If such proper conclusions of law had been

adopted then the court should have found in accordance with the uncontradicted evidence that: (Spec. of Err. 17) defendant is a corporation created by the United States (Appendix A), all of the stock of such corporation was and is owned by the United States (R. 154) and it is an instrumentality of the United States. (Appendix A.) Pursuant to such findings of fact the court should have concluded (Spec. of Err. 18) that said Section 10140 cannot be imposed on the defendant because it is a corporation created, wholly owned by and an instrumentality of the United States.

Penalties may not be imposed against Governmental Instrumentalities or the exercise of governmental functions by the United States.

Missouri Pacific Railroad Company v. *Ault*, 256 U. S. 554, 65 L. Ed. 1087, 41 S. Ct. 593. The plaintiff sought to impose upon the Director General of Railroads a penalty statute of Arkansas providing that if an employe is discharged he must be paid wages in full within seven days or as a penalty the wages of such employe shall continue at the same rate until paid. The United States had not only consented that the Director General might be sued but also had consented *that he should be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law.* Nevertheless it was held that the penalty could not be imposed. On page 563 the court said:

> * * * But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; *but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees.*

On page 564 the court said:

> *The purpose for which the Government permitted itself to be sued was compensation, not punishment.* * * * *But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute.* (Italics supplied.)

Accord: *Norfolk-Southern Railroad Company* v. *Owens,* 256 U. S. 565, 65 L. Ed. 1093, 41 S. Ct. 597.

The principle of the *Ault* case has been recently recognized and applied.

Corrigan v. *United States,* 298 Fed. 610 (D. C.S.D.N.Y.)

In *McCrea* v. *United States,* 3 Fed. Supp. 184 (D. C. S. D. N. Y.) the principle that the United States cannot be subjected to a penalty was overlooked in the trial of the case and a penalty was imposed against the United States. On motion for re-argument the court's attention was called to the decision in *Corrigan* v. *United States,* 298 Fed. 610, whereupon a rehearing was granted and the imposition of the penalty was denied on the authority of the *Ault* case. This decision was affirmed by the Second Circuit Court of Appeals in *McCrea* v. *United States,* 70 Fed. (2d) 632. On page 635 the court said:

> * * * In the Arkansas statute the pay for delay was called a penalty, while here it is not, but Justice Brandeis made it perfectly clear in his opinion in the Ault case that the name given to what does more than compensate and does punish is not decisive and double damages is given as an example of what the government has not consented to pay.

The decisions of the District Court and Circuit Court of Appeals in the *McCrea* case were affirmed by the Supreme Court of the United States, 294 U. S. 23, 79 L. Ed. 735, 55 S. Ct. 291, on other grounds.

The doctrine of the *Ault* case stands unimpaired.

When corporations such as defendant are created by the United States to make loans they are exercising governmental

functions both when making loans and when realizing on the security of loans.

The Federal Land Bank of St. Paul v. *Bismarck Lumber Co., et al.*, No. 76 in the October term, 1941, of the Supreme Court of the United States, decided November 10, 1941, ___L. Ed.___, 62 S. Ct. 1. The bank foreclosed a mortgage and acquired real property. It purchased fencing materials to fence the same. North Dakota attempted to collect a sales tax. The act creating the Federal Land Banks expressly made them exempt from taxation except on real estate. North Dakota contended that Congress could not constitutionally immunize the bank's activities from State taxation. The court held that the tax could not be applied. On page 5 the court said:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal goverment with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 477. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 32; Graves v. New York ex rel. O'Keefe, supra, 477.
>
> The federal land banks are constitutionally created, Smith v. Kansas City Title & Trust Co., 255 U. S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. *As part of their general lending functions the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government engaged in the performance of an important governmental function."* (Italics added.)

The reasoning of the court in this case is equally applicable to the Regional Agricultural Credit Corporation. No contention has been made that the latter was not constitutionally created. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. Ed. 577, 41 S. Ct. 243, would seem to negative any such contention.

The *Bismarck* case conclusively refutes the suggestion made in the lower court that these governmental corporations are to be treated as private corporations and that there is a trend in the Supreme Court of the United States in that direction. On page 5 the court discusses the case of *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705, which is one of the principal cases which has given rise to such suggestion. The Supreme Court stated that although it did say in the *Priddy* case that the corporations possess some of the characteristics of private business corporations that their character as Federal instrumentalities was specifically affirmed.

In *Graves* v. *New York*, 306 U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595, the court in discussing the functions of the Home Owners Loan Corporation on page 596 said:

> For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. Kay v. United States, 303 U. S. 1, 58 S. Ct. 468, 82 L. Ed. 607. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, *all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation.* (Italics added.)

The above statement from the *Graves* case was made applicable both to the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporations in the companion case to the *Graves* case, *State Tax Commission of Utah* v. *Van Cott*, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605, where the

reasoning and principles of the *Graves* case were made applicable to the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation.

The Supreme Court of the United States has recently pointed out that funds of these corporations, such as would be used to pay the penalty imposed in this case, are funds of the United States Government.

Inland Waterways Corporation v. *Young,* 309 U. S. 517, 84 L. Ed. 901, 60 S. Ct. 646 (1939). This case involved the question of whether national banks could give security for deposits made by three governmental agencies, to wit: Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation and the Secretary of War on behalf of the Panama Canal Zone. The court reasoned that the funds of these corporations and the losses thereof are the same for all practical purposes as those of the United States itself. On page 523 the court said:

> So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of ultra vires. Compare *Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, 8, 48 S. Ct. 12, 14, 72 L. Ed. 131.

On page 524 the court said:

> * * * The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States,* 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328; *Emergency Fleet Corp.* v. *Western Union,* 275 U. S. 415, 48 S. Ct. 198, 72 L. Ed. 345. *The funds of these corporations are, for all*

> *practical purposes, Government funds; the losses, if losses there be, are the Government's losses.* (Italics added).

Also the Supreme Court of the United States has again recently recognized the principle that the United States cannot be subjected to liabilities unless there is Congressional authority therefore. *United States* v. *Shaw*, 309 U. S. 495, 84 L. Ed. 888, 60 S. Ct. 659. On page 503 the court said:

> Jurisdiction in either case does not exist, unless there is specific congressional authority for it.

The defendant corporation is to be regarded in all particulars as an instrumentality of the United States.

Plaintiff admitted as a fundamental, undisputed fact that defendant is a corporation created by the United States, that all of the stock thereof was and is owned by the United States and that it is an instrumentality of the United States. In paragraph number 15 of plaintiff's brief on defendant's Objections to and Motion to Amend Findings of Fact and Conclusions of Law (R. 323) plaintiff addressed himself to paragraph 15 of defendant's Objections to and Motions to Amend Findings of Fact and Conclusions of Law in which defendant moved the court to amend the Findings of Fact by finding that defendant is a corporation created by the United States, that all of the stock thereof was and is owned by the United States and that it is an instrumentality of the United States. (R. 316.) With regard to that motion plaintiff says, "The Fifteenth finding is wholly immaterial. No controversy exists with regard thereto. The fact was conceded at the trial and stands out as a fundamental, undisputed issue." (R. 323.)

Regardless of this admission, the court should, perhaps, be advised of the nature of this Government instrumentality.

The Supreme Court of the United States described the Regional Agricultural Credit Corporation in *Keifer & Keifer* v. *Regional Agricultural Credit Corporation*, 306 U. S. 381, 83 L. Ed. 784, 59 S. Ct. 516. On page 387 the court said:

> On July 21, 1932, Congress enlarged the powers of the Reconstruction Finance Corporation (hereafter called "Reconstruction") established early that year, Act of January 22, 1932, c. 8, 47 Stat. 5, 15 U. S. C. A. Sec. 601, et seq., by authorizing it, among other things, to create regional agricultural credit corporations "in any of the twelve Federal land-bank districts." Emergency Relief and Construction Act of 1932, Sec. 201 (e), c. 520, 47 Stat. 709, 713, 12 U. S. C. A. Sec. 1148. Each corporation was to have a paid-up capital of not less than $3,000,000 to be subscribed for by Reconstruction, was to be managed by appointees of Reconstruction, and was empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock. Accordingly, on September 10, 1932, Reconstruction chartered the Regional Agricultural Credit Corporation of Sioux City, Iowa (hereafter called "Regional").

The conclusion of the court was that although the Regional Agricultural Credit Corporation was a government instrumentality it was subject to suit not only in contract actions but also in tort actions. On page 392 the court said:

> Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general corporate powers including authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." 47 Stat. 5, 6, 15 U. S. C. A. Section 604. When later Congress authorized Reconstruction to create these Regional Agricultural Credit Corporations, it did so by outlining in a single section of a comprehensive statute the broad scope of this added power for Reconstruction. 47 Stat. 709, 713. Congress naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being.

On page 394 the court said:

> *The legal position of Regional is, therefore, the same as though Congress had expressly empowered it "to sue and be sued."* (Italics added.)

The Supreme Court of the United States has recognized the Regional Agricultural Credit Corporations as Federal Agencies. *State Tax Commission of Utah* v. *Van Cott,* 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605. On page 512 the court said:

> * * * In his return of income taxes to the State for 1935 under this law, respondent claimed "as deduction" and "as exempt" salaries paid him as attorney for the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation, *both Federal agencies.* (Italics added.)

Statutes and executive orders of the United States Government demonstrate that defendant is part of the United States Government.

Section 201 (e) of the Emergency Relief and Construction Act of 1932, Sec. 1148 of Title 12, U. S. C. A. authorized the creation of the Regional Agricultural Credit Corporations and is set forth in Appendix A.

The management of the Regional Agricultural Credit Corporations was placed under the Farm Credit Administration by Executive Order of the President of the United States No. 6084 dated March 27, 1933, which Executive Order will be found on pages 793 and 794 of Title 12 U. S. C. A. The paragraph transferring the functions of the Reconstruction Finance Corporation in managing the Regional Agricultural Credit Corporation to the Farm Credit Administration will be found in Section (5) sub-section (e) of said Executive Order and is set forth in Appendix B.

The capital and assets of the Regional Agricultural Credit Corporations have been at all times owned by the United States. Section 1148a U. S. C. A. Title 12 provides that the capital of any Regional Agricultural Credit Corporation can be reduced and the funds made available by any such reduc-

tion should constitute a revolving fund available for the purpose of increasing the capital of any other Regional Agricultural Credit Corporation.

As recently as August 19, 1937, Congress enacted Sections 1148b, 1148c and 1148d of Title 12, U. S. C. A., to be found in the Pocket Supplement thereof on pages 192 and 193. These statutes are set forth in Appendix C and conclusively demonstrate that the Regional Agricultural Credit Corporations are part of the Farm Credit Administration and instrumentalities of the United States.

Reference to Section 1138d Title 12 U. S. C. A., to be found on pages 924 to 926, will show statutes of the United States creating criminal offenses for false representations, over-valuation of property, forgery, counterfeiting, alteration of obligations ,embezzlement, misapplication, false entries, concealment, conversion of property, conspiracy, all in relation to the Farm Credit Administration including Regional Agricultural Credit Corporations.

The intimate connection of the Regional Agricultural Credit Corporations to the sovereign government of the United States is also shown by Section 611a, Title 15, U. S. C. A. which provided that the Secretary of the Treasury was authorized to cancel notes of the Reconstruction Finance Corporation in exchange for the delivery up of stock of the Regional Agricultural Credit Corporations held by the Reconstruction Finance Corporation. Such stock was to be delivered to such person as might be designated by the President of the United States. Pursuant thereto the President of the United States designated the Secretary of the Treasury in Executive Order No. 7848 on March 22, 1938, which was published in the Federal Register for 1938, Volume 3, page 632, issue of March 25, 1938, and is set forth in Appendix D.

It is submitted that consideration of these statutes, Executive Orders and the case of *Keifer & Keifer* v. *Regional Agricultural Credit Corporation* demonstrates that the defendant is part of the sovereign government of the United States.

An analogy supporting the defendant's position is that municipal corporations are not subject to statutory penalties or punitive damages.

The policy behind the principle is that punishment by fines, penalties and the imposition of punitive damages is to cause private persons and corporations to obey the law and that they are inapplicable against the sovereign and its instrumentalities.

Hunt v. *City of Boonville,* 65 Mo. 620, 27 Am. Rep. 299,

Bennett v. *City of Marion,* 102 Iowa 425, 63 Am. State Rep. 454, 71 N. W. 360,

Woodman v. *Nottingham,* 49 N. H. 387, 6 Am. Rep. 526,

McGray v. *The City of Lafayette,* 12 Robinson 674, 43 Am. Dec. 239 (La.),

City of Chicago v. *Langlass,* 52 Ill. 256, 4 Am. Rep. 603,

19 *Ruling Case Law,* subject Municipal Corporations page 1141, Section 417.

The same principle has been applied as to the Home Owners Loan Corporation because it is an instrumentality of the United States Government.

Adams v. *Home Owners Loan Corporation,* 107 Fed. (2d) 139 (8th C. C. A.). On page 141 the court said:

> * * * Whether or not the officers and employees of the Home Owners' Loan Corporation entertained malice towards the plaintiff, or whether they acted in bad faith and without probable cause in forwarding information against him, the fact remains that the Corporation is an agency of the government charged by the Act and the Regulation made pursuant to the Act with an official duty to forward information concerning violations of law affecting the Corporation. Its motives in so doing can not be made the basis of an action against it by an individual in a malicious prosecution suit.

It is respectfully submitted that the judgment of the District Court should be set aside and that judgment should be entered in favor of the appellant.

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APPENDIX A

U. S. C. A. Title 12, Section 1148 (Emergency Relief and Construction Act 1932, Sec. 201 (e)):

> The Reconstruction Finance Corporation is authorized to create in any of the twelve Federal land-bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid-up capital of not less than $3,000,000, to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 602 of Title 15. *Such corporations shall be managed by officers and agents to be appointed by the Farm Credit Administration under such rules and regulations as it may prescribe.* Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding, fattening, or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Farm Credit Administration, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporations shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. (Italics added.)

APPENDIX B

Executive Order No. 6084, U. S. C. A. Title 12, pages 793 and 794 Section (5) sub-section (e):

> (5) There are transferred to the jurisdiction and control of the Farm Credit Administration:
>
> (e) The functions of the Reconstruction Finance Corporation and its Board of Directors relating to the

appointment of officers and agents to manage regional agricultural credit corporations formed under Section 201 (e) of the Emergency Relief and Construction Act of 1932; relating to the establishment of rules and regulations for such management; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof.

APPENDIX C

Sections 1148b, 1148c and 1148d of Title 12, U. S. C. A.:

Sec. 1148b. Additional powers of regional agricultural credit corporations. Each regional agricultural credit corporation, created under the authority of section 1148 of this title, in addition to the powers granted prior to August 19, 1937, shall have and, upon order or approval of the Farm Credit Administration, shall exercise the following rights, powers, and authority:

Places of transacting business

(a) To conduct, transact, and operate its business in any State in the continental United States, in the District of Columbia, and in Puerto Rico.

Borrow money

(b) To borrow money (other than by way of discount) from any other regional agricultural credit corporation, the Reconstruction Finance Corporation, or any Federal intermediate credit bank, and to give security therefor.

Loans

(c) To lend any of its available funds to any other regional agricultural credit corporation at such rates of interest and upon such terms and conditions as may be approved by the Farm Credit Administration.

Sale to or purchase from other like corporations

(d) To sell to or purchase from any other regional agricultural credit corporation or any corpora-

tion formed by consolidation or merger as provided in section 1148c of this title, any part of or all the assets of any such corporation, upon such terms and conditions as may be approved by the Farm Credit Administration, including the assumption of the liabilities of any such corporation, in whole or in part. (Aug. 19, 1937, c. 704, Sec. 32, 50 Stat. 716.)

Sec. 1148c. Consolidation or merger—Power of Farm Credit Administration.

(a) The Farm Credit Administration shall have the power and authority to order and effect the consolidation or merger of two or more regional agricultural credit corporations, on such terms and conditions as it shall direct.

(b) The Farm Credit Administration is authorized to grant charters to, prescribe bylaws for, and fix the capital of, regional agricultural credit corporations which may be formed by the consolidation of two or more regional agricultural credit corporations, and to approve or prescribe such amendments to the charter and bylaws of any regional agricultural credit corporation as it may from time to time deem necessary. Corporations formed by the consolidation of two or more regional agricultural credit corporations, as herein provided, shall have all the rights, powers, authority, and exemptions; shall be subject to the same supervision and control; and shall have their expenses paid in the same manner as provided by law in respect to regional agricultural credit corporations organized under section 1148 of this title. (Aug. 19, 1937, c. 704, Sec. 33, 50 Stat. 717.)

Sec. 1148d. Rights and powers unaffected by sections 1148b and 1148c.

Nothing contained in sections 1148b and 1148c of this title shall be construed as limiting the rights, powers, and authority granted prior to August 19, 1937, to the regional agricultural credit corporations, the Farm Credit Administration, or the Governor thereof

by any Acts of Congress or Executive Orders. (Aug. 19, 1937, c. 704, Sec. 34, 50 Stat. 717.)

APPENDIX D

Executive Order No. 7848 (Federal Register for 1938 Vol. 3, page 632)

By virtue of and pursuant to the authority vested in me by the Act of February 24, 1938, Public Number 432, 75th Congress, and the Act of March 8, 1938, Public Number 442, 75th Congress, I hereby designate *the Secretary of the Treasury on behalf of the United States* to receive from the Reconstruction Finance Corporation all of such capital stock as the Reconstruction Finance Corporation may hold pursuant to any provision of law referred to in Subsection B of Section 1 of the said Act of February 24, 1938, and to receive from the Secretary of Agriculture and the Governor of the Farm Credit Administration such stock of the Commodity Credit Corporation as they now hold. *The Secretary of the Treasury is hereby authorized and directed to exercise on behalf of the United States any and all right accruing to the holder of such stock.* (Italics added).

(S) FRANKLIN D. ROOSEVELT,
The White House,
March 22, 1938.